

Roger Johnson  
Agriculture Commissioner  
www.agdepartment.com



600 E Boulevard Ave., Dept. 602  
Bismarck, ND 58505-0020

217612  
Phone (701) 328-2231  
Toll Free (800) 242-7535  
Fax (701) 328-4567



September 15, 2006

ENTERED  
Office of Proceedings

SEP 22 2006

Part of  
Public Record

Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

**RE: Ex Parte 661 RAILROAD PRACTICES INVOLVING FUEL SURCHARGES**

The North Dakota Department of Agriculture respectfully submits the following comments regarding the above-referenced proposed measures.

As the nation's leader in production of more than a dozen commodities, North Dakota's economy is driven by agriculture. As such, this issue is of great significance to the agricultural producers and economy of North Dakota.

North Dakota's geographic location puts us in a unique position with respect to transportation. We are a "captive shipper" in industry terms. And, rail transportation is the mainstay in North Dakota—accounting for 78 percent of the grain and oilseed shipments in the 2004-2005 crop year, including 89 percent of our state's largest crop, hard red spring wheat. (Source: Upper Great Plains Transportation Institute at North Dakota State University).

Rate-based fuel surcharges have provided outrageous additional revenues for some railroads while the shipping rate increases are passed on to and paid by agricultural producers already strapped with soaring petroleum-based inputs and fuel expenses of their own. Unfortunately, producers are unable to impose a "fuel surcharge" on the commodities they raise.

We commend the Surface Transportation Board (Board) for exercising its authority to regulate railroad practices by proposing these measures to make fuel surcharges more equitable and their calculation more transparent. We fully support the proposed measures and urge their adoption. Additionally, we support improvements to the proposed rules that will no doubt be offered by shipper groups who have been closely involved in this matter.

Surface Transportation Board  
September 15, 2006  
Page Two

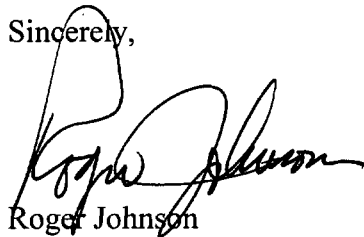
These actions are a step in the right direction. However, more must be done to keep railroad transportation viable and affordable for North Dakota producers. While it is preferable to let the free market work, it is impossible to do so in an area like North Dakota which is dominated primarily by a single monopolistic railroad. Either competition or regulation must be restored to meet the needs of those who rely on rail transportation.

I am including my February 16, 2006, remarks to the US Senate Committee on Commerce, Science, and Transportation addressing railroad service in North Dakota. I ask that the remarks be considered as part of these formal comments.

Again, we fully support and appreciate the Board's proposed measures on fuel surcharges and urge their immediate adoption and implementation.

Thank you for your consideration. If you have any questions, please call me at (701) 328-2231.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Johnson", is written over the printed name and title.

Roger Johnson  
Commissioner

RJ:jk



600 E Boulevard Ave., Dept. 602  
Bismarck, ND 58505-0020

**Remarks of Roger Johnson  
Agriculture Commissioner  
US Senate Committee on Commerce,  
Science & Transportation  
February 16, 2006  
Washington, D.C.**

---

Chairman Stevens and members of the Committee, I am North Dakota Agriculture Commissioner Roger Johnson. I am here today in to speak with you regarding several unresolved issues with the Burlington National Santa Fe Railway (BNSF) and the negative impacts those are having on our small grains industry in North Dakota. The other Class I rail carrier operating in my state is the Canadian Pacific Railway (CPR). We have some of the same problems with CPR, but it is less dominant in terms of both practices and size.

**Background**

The importance of agriculture to North Dakota's economy, families, and communities can not be overstated. Agriculture is the engine of our economy and the mainstay for the hundreds of towns that dot our 44 million-acre landscape. North Dakota agricultural production generated more than \$4 billion in cash receipts last year. We're the nation's leading producer of more than a dozen commodity categories – flaxseed, canola, dry edible peas, durum wheat, pinto beans, spring wheat, all sunflowers, oil sunflowers, non-oil sunflowers, barley, lentils, all dry edible beans, honey and oats.

While North Dakota dominates the nation in the production of several crops, the actual volume of many of these crops necessitates a transportation system that BNSF is moving away from – namely blocks of 5 or 10 cars and 26- and 52-car trains. Some of our corn and soybeans, and lesser amounts of our spring wheat and durum wheat, are the only North Dakota crops that can utilize the 100-110-car shuttle train system for transport to their final destination.

North Dakota's geographic location puts us in a unique position with respect to transportation. We are a "captive shipper" in industry terms – primarily at the mercy of a single, monopolistic railroad – BNSF. And rail transportation is the mainstay in North Dakota – accounting for 78 percent of the grain and oilseed shipments in the 2004-2005 crop year, including 89 percent of our state's largest crop, hard red spring wheat. (Source: UGPTI).

I would like to bring several issues to your attention today:

- BNSF's allocation/availability of cars is inadequate and unacceptable.
- BNSF and other railroads have been imposing unfair, outrageous fuel surcharges.
- Surface Transportation Board (STB) has not acted.
- Congress should enact S. 919 – the "Railroad Competition Act of 2005".

#### **BNSF's allocation/availability of cars is inadequate and unacceptable**

BNSF had a grossly inadequate number of grain hopper cars available for months at a time in the fall and winter of 2003-04, 2004-05 and since August of this past year. I'm told it is catching up now in February. Railcars have been shifted around, out of and into different ordering programs. Some programs have been severely curtailed or shut down entirely for months. This has left our grain shippers with two options – not to ship their product or bid against one another for cars that are already overpriced by BNSF.

This limited availability of cars creates a scramble for what's left and a steep increase in the price shippers have to pay.

For example, in the summer of 2005, BNSF suspended nearly all ordering of railcars through its Certificate of Transportation (COT) program for upcoming harvest months. During one week in August, BNSF opened the bidding a crack and offered 75 single car COT orders for October placement. There were 858 bids, 11 bids for every car, and those who “won” the bids paid close to \$400 per car over the tariff. That same day there were 668 bids for 45 grain cars for November placement, with winning bids paying \$419 over tariff. This is about 12 cents per bushel - a significant amount of money when grain is produced and handled on a thin profit margin. Depending on location of the bidding grain elevator, this is a 15-25 percent increase in the normal tariff rate. No business voluntarily bids up a key expense component, but in this case the railroad is the only game in town. Bids went much higher in later fall months. By restricting the allocation of car supply, BNSF has been able to reap higher and higher profits as shippers desperately scramble to book transportation. BNSF takes these bookings and bids as signals that the market will bear even higher rates. **But this is not a market – by definition it is a monopoly and should be governed as such.**

#### **BNSF and other railroads have been imposing unfair, outrageous fuel surcharges**

Like other railroads, BNSF has been capitalizing on unfair fuel surcharges. Those were calculated as a percentage of the rate, which often has little if anything to do with distance, the primary component of total fuel cost. Some wheat shipments from my state paid 70 percent more fuel surcharge per car mile than shipments of other crops more distant from the same destination market. As of September 2005, fuel surcharges were at 11.5 percent, October was 13 percent, November 16.5 percent, and December 18 percent. Calculations using BNSF numbers show that in some cases these rate-based surcharges exceeded the entire cost of fuel and in some cases the surcharge was seven times the actual increase in cost. In the fourth quarter of 2005, BNSF reported an increase in fuel surcharge revenue over the prior year of \$274 million, while the actual fuel cost increased only \$210 million. That was an extra \$64 million windfall in only one quarter.

The January 1, 2006, change to a per car mile surcharge is a step in the right direction toward a cost-based program. I commend BNSF for taking action on this and urge other railroads to do the same. Now let's go the rest of the way to a truly cost-based fuel surcharge.

**Surface Transportation Board (STB) has not acted**

The Surface Transportation Board's inaction continues to allow BNSF to operate as a monopoly. The lack of response from the STB destroys the statutory requirement that carriers must provide service upon reasonable request (49 U.S.C. 11101), and also the requirement in Section 11121 that railroads "shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service."

In the COT case [*National Grain & Feed Assoc. v U.S.*, F.3d306 (1993)], the Eighth Circuit Court of Appeals held that a special railroad service may not unduly impair the carrier's ability to meet its common carrier obligations. The STB continues to ignore that instruction by allowing BNSF to neglect non-shuttle COT and conventional tariff service.

**I ask Congress to put the STB into action and address this monopolistic abuse by the BNSF.** If left to operate as the monopoly it has become, BNSF will continue to squelch the profitability of North Dakota agriculture – and the agricultural industry throughout the country.

The commissioners, directors and secretaries of agriculture of the 50 states and 4 provinces agree that more oversight must be given in places where competition is not present. The National Association of State Departments of Agriculture (NASDA) policy reads, in part: "...NASDA urges all railroads to charge reasonable rates, offer fair and consistent rate spreads and service to all shippers, and treat all shippers equitably. NASDA also encourages railroads to offer co-loading of trains, and to have reasonable loading policies that hold both shippers and railroads responsible for moving equipment promptly. NASDA believes that Congress and the federal government should substantially increase oversight of railroads, including rates and services, where competition is not present." (Emphasis added.)

In addition, Congress will soon have the opportunity to scrutinize a new nominee to be chairman of the STB. I urge the President to nominate and you to confirm an individual who understands the issues facing captive shippers and who has a strong background in production agriculture.

### **Congress should enact S. 919 – the “Railroad Competition Act of 2005”**

Last year, US Senator Conrad Burns, along with US Senator Byron Dorgan and several other senators introduced S. 919 – the Railroad Competition Act of 2005, which amends federal transportation law and sets specific objectives for transportation policy governing the US rail system.

The legislation provides several measures that will extend competition to captive rail customers – states like North Dakota – and will address many of the problems with the STB’s implementation of railroad deregulation. **I strongly urge Congress to pass this legislation.**

### **Conclusion**

In summary, I strongly urge BNSF and other railroads to increase the availability and total allocation of rail cars and, if it is necessary at all, implement fuel surcharges that reflect the actual increased cost of fuel. In addition, the STB must act more boldly in enforcing the laws that govern the railroads. Captive rail customers need protection from abusive dominant railroads, not the other way around. Congress should enact the “Railroad Competition Act of 2005” to rebalance interest between railroads and their customers.

Thank you for the opportunity to speak with you today. I’d be happy to answer any questions that you may have.